

# ARKANSAS SUPREME COURT

No. 08-993

BENJAMIN WILLIAMS, JR.  
Petitioner

v.

LARRY NORRIS, DIRECTOR,  
ARKANSAS DEPARTMENT OF  
CORRECTION  
Respondent

**Opinion Delivered** November 20, 2008

PRO SE MOTION FOR RULE ON  
CLERK [CIRCUIT COURT OF  
LINCOLN COUNTY, LCV 2008-9,  
HON. ROBERT H. WYATT, JR.,  
JUDGE]

MOTION DENIED.

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## PER CURIAM

On January 23, 2008, petitioner Benjamin Williams, Jr., an inmate incarcerated in the Arkansas Department of Correction, filed a petition for writ of habeas corpus in Lincoln County Circuit Court. On February 13, 2008, the circuit court entered an order that dismissed the petition. Petitioner timely filed a notice of appeal on March 11, 2008, and later filed a motion for an extension of time to file the record on appeal. The circuit court granted the motion for an extension of time to file the record, but our clerk declined to file the record tendered on July 11, 2008, on the basis that the order extending the time to file the record was invalid and the record was due on June 9, 2008. Petitioner has now filed this pro se motion for rule on clerk, along with an affidavit of indigency that was not contested by the State.

Petitioner contends that the circuit clerk delayed preparation of the record due to petitioner's failure to pay certain fees, and that our clerk was in error to determine that the order granting an extension of time to file the record was invalid or that the record was not in fact tendered in a timely

fashion. We do not, however, consider the merits of petitioner's arguments in the motion, because it is clear on the partial record before us that, even if we were to grant petitioner's motion, he cannot prevail on any appeal. An appeal of the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Lukach v. State*, 369 Ark. 475, 255 S.W.3d 832 (2007) (per curiam).

Petitioner's claims as set forth in the petition alleged that the trial court did not have jurisdiction because he was in fact innocent of the charges. In support of that claim, petitioner presented a number of arguments concerning the sufficiency of the evidence against him, alibi evidence, ineffective assistance of counsel, evidence withheld by the prosecution, and other claims of prosecutorial misconduct and constitutional deficiencies, including due process and other procedural violations, that he asserted amounted to a denial of access to the courts.

Although Arkansas Code Annotated § 16-112-103 (Repl. 2006) provides that a writ of habeas corpus may issue where the petitioner asserts a claim of actual innocence, those claims must be made in accordance with Act 1780 of 2001 Acts of Arkansas, codified as Arkansas Code Annotated §§ 16-112-201 – 16-112-208 (Repl. 2006). Petitioner did not reference Act 1780, did not request or reference scientific testing, and did not file his petition in the trial court as required by section 16-112-201. His petition therefore may not be considered as one arising under that act.

Where Act 1780 is not applicable, the burden is on the petitioner in a habeas corpus petition to establish that the trial court lacked jurisdiction or that the commitment was invalid on its face; otherwise, there is no basis for a finding that a writ of habeas corpus should issue. *Young v. Norris*, 365 Ark. 219, 226 S.W.3d 797 (2006) (per curiam). The petitioner must plead either the facial invalidity or the lack of jurisdiction and make a "showing by affidavit or other evidence, [of]

probable cause to believe" he is illegally detained. *Id.* at 221, 226 S.W.3d at 798-799. Here, although petitioner attempted to frame the questions as falling within those parameters, the petition failed to include any claim as to the facial invalidity of the judgment or lack of jurisdiction.

All of appellant's claims could have been raised either on direct appeal or in a proceeding under Arkansas Rule of Criminal Procedure 37.1. A habeas corpus proceeding does not afford a prisoner an opportunity to retry his case, and is not a substitute for postconviction relief. *Friend v. Norris*, 364 Ark. 315, 219 S.W.3d 123 (2005) (per curiam). Constitutional violations as claimed by appellant, including prosecutorial misconduct or other irregularities at trial, are factual issues that should have been addressed during trial or through a direct appeal. *See id.* Ineffective-assistance-of-counsel claims may be addressed in Rule 37.1 proceedings and are not cognizable by writ of habeas corpus. *See McConaughy v. Lockhart*, 310 Ark. 686, 840 S.W.2d 166 (1992).

Because petitioner failed to state any cognizable claim in his petition, he did not meet his burden to show a basis for a finding that a writ of habeas corpus should issue. Petitioner cannot therefore prevail on appeal of the order dismissing his petition, and we accordingly deny his motion for rule on clerk.

Motion denied.